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February 10, 2000

EX PARTE OR LATE FILED

NOTICE OF EX PARTE PRESENTATION

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals - 445 12th Street, SW
Washington, D.C. 20554

Re: **Inter-Carrier Compensation for ISP-Bound Traffic**
CC Docket Nos. 96-98 and 99-68

Dear Ms. Salas:

On February 9, 2000, Cindy Schonhaut, Executive Vice President, Government and Corporate Affairs, and the undersigned counsel, on behalf of ICG Communications, Inc., met with Kyle Dixon, Legal Adviser to Commissioner Powell, to discuss reciprocal compensation for ISP-bound traffic and related issues that have been raised in the above-referenced docket. In addition to reiterating ICG's views as contained in ICG's comments, the enclosed handout was used as the basis for our discussion.

If you need any further information, please do not hesitate to give me a call.

Sincerely yours,

Albert Kramer

Albert H. Kramer

AHK/rw
Enclosure
cc: Mr. Kyle Dixon

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ICG Communications, Inc.

ISP-Bound Reciprocal Compensation Meetings

February 9, 2000

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QUOTES FROM STATE DECISIONS

"We find that the FCC has claimed jurisdiction over this traffic and will ultimately adopt a final rule on this matter...Accordingly, we find that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local and whether reciprocal compensation is due for this traffic." *Florida Order* at 5.

"In view of the FCC's practical negation of the legal and analytic basis of our October Order, we see no logical alternative to vacating the Order [which had required reciprocal compensation] in response to the Motion for Modification...Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute [as to how ISP bound traffic should be compensated]...[O]ur findings...[in the earlier order] applied to all interconnection agreements; and now a corresponding but converse understanding based on the instant Order appears warranted. In fact as far as reciprocal compensation payments not made to MCI WorldCom or other CLECs as of February 26, 1999 are concerned, no currently effective Department order categorically requires Bell Atlantic to pay, in some way, for handling CLECs' ISP-bound traffic...This arrangement is reasonable for the nonce, i.e., until the dispute is settled." *Massachusetts Order* at 25-28.

"Ultimately, the FCC should exercise is primary jurisdiction to decide the appropriate amount of reciprocal compensation, if any, that should be paid for ISP-bound traffic. Until the FCC makes that decision, the Commission will not attempt to determine the amount of compensation that should be paid." *Missouri Order* at 2-3.

"ISP-bound traffic, as determined by the FCC, is interstate in character, and therefore, in the Board's view, is not entitled to reciprocal compensation...We expect that GNI will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries." *New Jersey Order* at 11.

"Based upon the evidence before it, the positions advocated by the parties, and the Declaratory Ruling of the FCC, the Commission finds that reciprocal compensation should not apply to ISP-bound traffic. The FCC in its *Declaratory Ruling* concluded that ISP-bound traffic is non-local interstate traffic and clearly left the determination of whether to impose reciprocal compensation obligations in an arbitration proceeding to the state commissions. [citations omitted]. This Commission concludes that ISP-bound traffic is not subject to reciprocal compensation." *South Carolina Order* at 64.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.	DOCKET NO. 990691-TP ORDER NO. PSC-00-0128-FOF-TP ISSUED: January 14, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

APPEARANCES:

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On behalf of BellSouth Telecommunications, Inc.

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On behalf of ICG Telecom Group

C. Lee Fordham, Esquire, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0870.
On behalf of the Florida Public Service Commission

prospective compensation would serve the public interest. (FCC 99-38, ¶28) To this end, the FCC has issued a Notice of Proposed Rulemaking, seeking comments on two proposals for a rule. In the meantime, they have left it to state commissions to determine whether reciprocal compensation is due for this traffic.

We find that the FCC has claimed jurisdiction over this traffic and will ultimately adopt a final rule on this matter.

> We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic. FCC 99-38, ¶16

Further, as mentioned earlier, the FCC intends to adopt a final rule to govern inter-carrier compensation for ISP-bound traffic. Therefore, any decision we make would only be an interim decision. For that reason, in the MediaOne and BellSouth arbitration in Docket No. 990149, we ruled that the parties should continue to operate under their current contract pending a decision by the FCC. We still believe this approach to be reasonable under the facts of this case and in view of the uncertainty over this issue. Any decision we might make would, presumably, be preempted if it is not consistent with the FCC's final rule. Accordingly, we find that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local and whether reciprocal compensation is due for this traffic.

III. PACKET SWITCHING CAPABILITIES

This issue does not address whether BellSouth will provide the packet-switching capabilities that ICG has requested, but whether these capabilities will be provided as UNEs. According to 47 C.F.R. Section 51(f), Pricing of Elements, certain pricing rules apply to UNEs, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation. Specifically, FCC Rule 47 C.F.R. Section 51.503(b) reads:

> An incumbent LEC's rates for each element it offers shall comply with the rate structure

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The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

May 19, 1999

D.T.E. 97-116-C

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

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Petitioner

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-and-
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FOR: BELL ATLANTIC-MASSACHUSETTS
Respondent

state "contractual principles or other legal or equitable[26] considerations," Internet Traffic Order at ¶ 27, our Order stood *squarely, expressly, and exclusively* on a "two call" premise. That foundation has crumbled.[27] There is no alternative or supplemental finding in our October 1998 Order to rely on in mandating continued reciprocal compensation for ISP-bound traffic. In view of the FCC's practical negation of the legal and analytic basis of our October Order, we see no logical alternative to vacating that Order in response to the Motion for Modification. We hereby vacate MCI WorldCom, D.T.E. 97-116.

Unless *and until* some future investigation of a complaint, if one is filed, concerning the instant interconnection agreement determines a different basis for such payments, there presently is no Department order of continuing effect or validity in support of the proposition that such an obligation arises between MCI WorldCom and Bell Atlantic. Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations

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[26] The FCC's use of the word "equitable" is ambiguous. It is not clear what equitable powers a regulatory agency could, in any event, claim to exercise, as it acts under a statutory grant. The FCC's observation was evidently intended to cushion the jurisdictional blow, but all it does is muddle the message, as Commissioner Powell has observed. Internet Traffic Order, Concurrence of Commissioner Powell, text at n. 1

[27] The parties to this docket have diligently provided the Department with other states' decisions on reciprocal compensation rendered since Internet Traffic Order was issued. We have reviewed those filings. Other state commissions considered the effects of the FCC's ruling on *their* situations, on the interconnection agreements before them, and on prior decisions rendered. We have before us only *our own* October Order and the interconnection agreement construed by that Order. Useful as it has been to know what other states have made of the FCC's ruling, it is equally useful to recall Commissioner Powell's observation about the effects of that ruling: "Furthermore, having reviewed a number of the state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state." Internet Traffic Order, Concurrence of Commissioner Powell, page 2

under their interconnection agreement, there is–*post* February 26, 1999–no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.

The consequences may be adverse for enterprises that acted aggressively in reliance on the nullified and now-vacated Department decision in MCI WorldCom's favor (ignoring the Department's express warnings that its decision could be changed by FCC findings). But no amount of wishful thinking can our justify clinging to a vitiated decision; nor can it empower the Department to countermand what the FCC has determined. The attempt of some parties and commenters to base their arguments on the vague terms of Paragraph 27 of Internet Traffic Order is futile. If that paragraph has any effective meaning (a matter open to doubt, given the FCC's reference to its pending rulemaking), then surely it is that only those pre-26 February decisions by state commissions founded, not on a "two call" jurisdictional theory, but rather on state contract law or some "other legal or equitable considerations" *might yet* remain viable–at any rate, "depending on the bases of those decisions" and, of course, "pending the completion of the rulemaking" the FCC initiated. Internet Traffic Order at ¶ 27. It seems patent that the FCC had in mind state decisions already, or yet to be, taken[28]--and that only to the extent such decisions might fit this vague criterion. The Department's October

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[28] The FCC's wording ("any determination a state commission has made, or may make in the future"), Internet Traffic Order at ¶ 24, must be read in light of the only plausible, saving grounds for such state determinations set out by the FCC in ¶ 27 (state decisions taken, before or after February 26, that rest on "contractual principles or other legal or equitable considerations"). State decisions whose conclusions "are based on a finding that this [ISP-bound] traffic terminates at an ISP server," id., are in another category, however. And our October Order falls into this latter group.

Order was not so based–with the result that, were that Order not vacated, it would float, untethered, in a jurisdictional void. MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts contract law "or other legal or equitable considerations" give rise to mutual obligation on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement.[29]

How useful such a renewal might be is not predictable. We suggest a perhaps more promising course below.

Pending, however, such a renewal of the complaint and ultimate resolution of the matter, Bell Atlantic's Motion for Modification of March 2, 1999 is granted, in that the Department's Order in MCI WorldCom, D.T.E. 97-116, is vacated. Although that Order adjudicated only the Bell Atlantic-MCI WorldCom dispute, it professed to have broader implication (see Section IV of the October Order); and so, the suggested, broader applicability of that Order must, since the issuance of Internet Traffic Order, be doubted. MCI WorldCom, D.T.E. 97-116 at 14. However, Bell Atlantic has acted, since the October Order, on the understanding that our findings in MCI WorldCom applied to all interconnection agreements; and now a corresponding but converse understanding based on the instant Order appears warranted. In fact, as far as reciprocal compensation payments not made to MCI WorldCom

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[29] We do not, at this point, hazard a judgment whether such an alternative basis exists in the Bell Atlantic-MCI WorldCom interconnection agreement before us. If such a basis can be convincingly shown, then it would not be the Department's role to save contracting parties from later-regretted commercial judgments. See Complaint of A-R Cable Services, Inc., D.T.E. 98-52, at 5 n. 7 (1998).

or other CLECs as of February 26, 1999 are concerned,[30] no currently effective Department order categorically requires Bell Atlantic to pay, in some way, for handling CLECs' ISP-bound traffic. Bell Atlantic has proposed making payments under its interconnection agreements at a ratio not in excess of 2:1(terminating-to-originating traffic).[31] This arrangement is reasonable for the nonce, i.e., until the dispute is settled.

Reciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999. Yet it still appears there were and may still be costs incurred by

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30 This finding partly addresses RNK's Motion for Clarification. Bell Atlantic's Motion for Modification of our October Order intimates that reciprocal compensation payments made for ISP-bound traffic before February 26, 1999 were never truly due and owing under the interconnection agreement. Bell Atlantic notes that "there is no severable 'local' component of an Internet call but such traffic is now, and *always has been*, interstate traffic. . . . Internet-bound calls are not eligible for 'local' reciprocal compensation under BA-MA's interconnection agreements, and CLECs have received substantial compensation to which they are not entitled under those agreements." Bell Atlantic's Motion for Modification, at 10. Despite Bell Atlantic's intimation, the question of refund is not before us, and so we take no position on the status of payments made by Bell Atlantic for reciprocal compensation for ISP-bound traffic prior to February 26, 1999. To do so now would be premature–assuming that D.T.E. even has jurisdiction over the question of refunds and considering the instructions below as to negotiations, mediation, and, if it must come to that, arbitration. But we shall not require Bell Atlantic to make (i.e., to disburse) any payments that were not made as of that date. See text immediately *infra*.

31 In the current absence of a precise means to separate ISP-bound traffic from other traffic, we believe that Bell Atlantic's 2:1 ratio as a proxy is generous to the point of likely including some ISP-bound traffic. However, this 2:1 proxy is rather like a rebuttable presumption, allowing any carrier to demonstrate adduce evidence in negotiations, or ultimately arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy. Where disputes arise, however, the disputants are well advised to work the matters out between themselves, rather than bringing them to this forum after less-than-thorough negotiations.

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STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

At a Session of the Public Service

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In the Matter of the Petition of Birch)

Telecom of Missouri, Inc. for Arbitration)

of the Rates, Terms, Conditions and Related) **Case No. TO-98-278**

Arrangements for Interconnection with)

Southwestern Bell Telephone Company.)

ORDER CLARIFYING ARBITRATION ORDER

On April 23, 1998, the Commission issued an Arbitration Order bearing an effective date of April 24. The Arbitration Order resulted from a petition filed with the Commission by Birch Telecom of Missouri, Inc. (Birch), asking that the Commission arbitrate terms of an interconnection agreement between Birch and Southwestern Bell Telephone Company (SWBT).

The only issue presented for arbitration was whether calls made within the same local calling scope to an Internet Service Provider (ISP) are local in nature and subject to the payment of reciprocal compensation. The Commission's Arbitration Order does not make a final decision concerning the nature of the traffic to an ISP. Instead the Commission chose to defer to an anticipated decision by the Federal

Communications Commission (FCC) regarding the nature of that traffic. The Commission's order did provide that until the FCC made a ruling on that issue, Birch and SWBT were to compensate each other for traffic to ISPs "in the same manner that local calls to non-ISP end users are compensated, subject to a true-up following the Federal Communication Commission's determination on the issue if it becomes possible to implement a Commission approved tracking plan in the interim."

On February 26, 1999, the FCC released a Declaratory Ruling in CC Docket No. 96-98. That ruling declared that traffic delivered to an ISP is primarily interstate in character, thus falling within the primary jurisdiction of the FCC. The FCC did not, however, determine what, if any, reciprocal compensation should be paid for calls to Internet Service Providers and instead issued a notice of proposed rulemaking to deal with that issue.

On April 30, 1998, in response to the Commission's Arbitration Order of April 23, SWBT filed an Application for Rehearing. The Commission issued an order on March 9, 1999, denying SWBT's application for rehearing. In that order the Commission stated that "given the fact that the FCC has now resolved the issue in dispute between the parties, there is no longer any need for this Commission to address that matter." The Commission believed that its March 9 order would resolve the dispute between SWBT and Birch. That was not the case.

On March 8, Birch filed a Compliance Filing and Motion for Clarification. Subsequent to the Commission's order denying SWBT's application for rehearing, on March 12, Birch filed a supplement to its motion for clarification. Birch argues that, while the FCC did determine that calls to Internet Service Providers, when exchanged between two carriers within the same local calling area in a state, are primarily subject to the FCC's jurisdiction, the FCC did not determine the amount of compensation that should be paid between carriers for the handling of those calls. The FCC also did not overturn prior state decisions in arbitration cases that would require that such compensation be paid. Birch suggests that the Commission's April 23, 1998 arbitration order requires that SWBT and Birch continue to pay reciprocal compensation for ISP bound traffic as if they are local calls until the FCC finally decides the amount of compensation that should be paid for those calls. On March 22, 1999, SWBT filed a response to Birch's Motion for Clarification in which it asserted that the Commission's orders required that no reciprocal compensation be paid for such calls.

Because of the continuing dispute between the parties, the Commission finds that it is necessary to clarify its position. The FCC's Declaratory Ruling in CC Docket No. 96-98 determined that calls made within the same local calling scope to an Internet Service Provider are more interstate than local in nature. That ruling calls into question the Commission's ruling that such calls should be compensated as local calls pending the FCC's ruling.

Ultimately, the FCC should exercise its primary jurisdiction to settle

the appropriate amount of reciprocal compensation, if any, that should be paid for ISP-bound traffic. Until the FCC makes that decision, the Commission will not attempt to determine the amount of compensation that should be paid. Because the appropriate amount of compensation has not yet been determined, the parties will not be required to pay reciprocal compensation for ISP-bound traffic at this time. Nevertheless, it would be inappropriate to order that no compensation be allowed to accrue until the FCC issues its rule. The parties will be directed to continue to track traffic to ISPs as they have been doing under the Internet Service Provider Traffic Tracking Agreement that was filed with the Commission on June 11, 1998. After the FCC makes its final determination on the issue of compensation, the parties will be subject to a true-up to determine what, if any, compensation should be paid for the ISP-bound traffic that is measured up to that time.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. are relieved of any obligation to immediately compensate each other for traffic to Internet Service Providers within a local calling scope that was imposed by the Commission's Arbitration Order of April 23, 1998.

2. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. shall continue to track traffic to Internet Service Providers within a local calling scope as they have been doing under the Internet Service Provider Traffic Tracking Agreement that was filed with the Commission on June 11, 1998.

3. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. are subject to a true-up to determine the amount of compensation that shall be paid for the ISP-bound traffic that is measured pursuant to the Internet Service Provider Traffic Tracking Agreement up to the time that the FCC determines the issue of compensation for that traffic.

4. That this order shall become effective on April 16, 1999.

BY THE COMMISSION

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge

(S E A L

Lumpe, Ch., Murray, Schemenauer

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STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

IN THE MATTER OF THE PETITION OF GLOBAL NAPS INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH BELL ATLANTIC-NEW JERSEY, INC. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	TELECOMMUNICATIONS DECISION AND ORDER DOCKET NO. TO98070426

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes final action taken by the New Jersey Board of Public Utilities (Board) in the arbitration requested by Global NAPs, Inc. (GNI) by letter dated June 30, 1998, and will resolve all outstanding and unresolved issues in GNI's interconnection dispute with Bell Atlantic-New Jersey, Inc. (BA-NJ).

PROCEDURAL HISTORY

On January 26, 1998, GNI requested interconnection and network elements from BA-NJ pursuant to section 251 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, codified in scattered sections of 47 U.S.C. §151 et seq. (hereinafter, the Act). During the period from the 135th to the 160th day after receipt of an interconnection request, the carrier or any other party to the negotiation may petition the State commission to arbitrate any outstanding issues. The State commission is required to resolve each issue set forth in any such proceeding "not later than 9 months after the date on which the local exchange carrier received the [interconnection] request under this section." 47 U.S.C. §252(b)(4)(C).

By letter dated June 30, 1998 and pursuant to section 252(b)(1) of the Act, GNI filed with the Board of Public Utilities (Board) a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief. GNI essentially sought affirmation through the arbitration process that it was entitled to opt into an interconnection agreement previously

NJ to interpret. Because of GNI's right to MFN an existing interconnection agreement, we FIND that it is appropriate to apply to GNI and BA-NJ the rates and terms in the existing MFS agreement which GNI desires to MFN with respect to reciprocal compensation obligations for traffic which is truly local. ISP-bound traffic, as determined by the FCC, is interstate in character, and, therefore, in the Board's view, is not entitled to reciprocal compensation. All other local traffic carried by GNI shall be subject to reciprocal compensation at the negotiated rates in the MFS interconnection agreement, that is $0.009 for local traffic delivered to a tandem switch and $0.007 for local calls delivered to an end office.

We expect that GNI will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries. Nevertheless, the Board is mindful of the FCC's ongoing rulemaking with regard to the appropriate form of inter-carrier compensation mechanism for ISP-bound traffic. We assure carriers that the Board shall review the FCC's ultimate ruling regarding such compensation and take appropriate action, as needed. Of course, the parties themselves are not foreclosed from further negotiations to develop more appropriate forms of compensation.

Accordingly, to clarify the last issue decided by the Arbitrator, the Board herein FINDS that the MFS interconnection agreement rates for reciprocal compensation, and not the Board's generic rates, shall apply to the interconnection agreement between the parties. The Arbitrator found that negotiated rates took precedence over rates determined by either regulation or by arbitration. Accordingly, he determined that the rates for reciprocal compensation negotiated by and between MFS and BA-NJ are applicable to the local traffic exchanged between GNI and BA-NJ. The Board agrees with the Arbitrator in this regard, but clarifies that the MFS interconnection agreement rates do not apply to the ISP-bound traffic carried by GNI since that traffic is interstate traffic pursuant to the FCC's Declaratory Ruling.

In conclusion, the Board FINDS that the resolution of all open arbitration issues set forth above and the conditions imposed herein upon the parties is consistent with the public interest and in accordance with law. The Board HEREBY APPROVES an interconnection agreement between the parties which is the same as the MFS agreement referenced above, as modified herein, as meeting the requirements of the Act for agreements which are in part

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 1999-259-C - ORDER NO. 1999-690

OCTOBER 4, 1999

IN RE:	Petition of ITC^DeltaCom Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.	))))	ORDER ON ARBITRATION

I. INTRODUCTION

This arbitration proceeding is pending before the South Carolina Public Service Commission ("Commission") pursuant to Section 252 (b) of the Telecommunications Act of 1996 ("1996 Act"). This proceeding arose after ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and BellSouth Telecommunications, Inc. ("BellSouth") were unable to reach agreement on all issues despite the good faith negotiations conducted over an extended period of time. On June 11, 1999, ITC^DeltaCom filed a Petition for Arbitration with BellSouth in South Carolina. BellSouth filed its Response to ITC^DeltaCom's Petition on July 6, 1999. The Petition and Response included a list of some seventy-three (73) issues to be decided by this Commission.

The Hearing of this Arbitration was held on September 8 – 9, 1999, with the Honorable Philip T. Bradley, Chairman, presiding. Prior to the evidentiary hearing, the parties were able to resolve approximately forty (40) of the disputed issues that were originally listed in the Petition. Thus, this Commission will only address in this Order the remaining disputed issues as of the date of the Hearing. At the evidentiary hearing,

also stated that state commissions were "free not to require the payment of reciprocal compensation for this traffic." FCC 98-38, ¶ 26.

Based upon the evidence before it, the positions advocated by the parties, and the Declaratory Ruling of the FCC, the Commission finds that reciprocal compensation should not apply to ISP-bound traffic. The FCC in its *Declaratory Ruling* concluded that ISP-bound traffic is non-local interstate traffic and clearly left the determination of whether to impose reciprocal compensation obligations in an arbitration proceeding to the state commissions. FCC 98-38, footnote 87 and ¶ 26.This Commission concludes that ISP-bound traffic is not subject to reciprocal compensation. While it may be true that ISP-bound traffic travels similar paths across the same facilities as local calls to residential customers as advanced by ITC^DeltaCom, it is also clear that ISP-bound calls do not terminate at the ISP. In the example given by witness Starkey for ITC^DeltaCom, the local call to the residential customer clearly terminates on the ITC^DeltaCom network. ISP-bound traffic, on the other hand, does not terminate at the ISP's server but continues to the ultimate Internet destination which is often located in another state. *See* FCC 99-38, ¶ 12. As ISP-bound traffic does not terminate at the ISP's server on the local network, this Commission finds that ISP-bound traffic is non- local traffic. Further, since Section 251 of the 1996 Act requires that reciprocal compensation be paid for local traffic, the Commission further finds that the 1996 Act imposes no obligation on parties to pay reciprocal compensation for ISP-bound traffic.

The Commission is also aware that the FCC has initiated further proceedings regarding the issue of ISP-bound traffic and reciprocal compensation. Of course, this

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF ICG TELECOM GROUP, INC.'S PETITION FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS RELATED ARRANGEMENTS WITH AMERITECH OHIO.	)))))))	Arbitration Case No. 99-1153-TP-ARB

AMERITECH OHIO'S EXCEPTIONS TO THE ARBITRATION PANEL REPORT

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application," as the Petition framed the issue, or until the Commission adopts a different rule in the generic arbitration it has established in Case No. 99-941-TP-ARB. (Section III below.)

I. THE COMMISSION DOES NOT HAVE JURISDICTION TO RENDER THE DECISION ON ISSUE 3 THAT THE PANEL RECOMMENDS.

If ISP traffic were local, the Commission would have jurisdiction to order the parties to pay each other reciprocal compensation on it. Because ISP traffic is interstate, however, it is not subject to reciprocal compensation under section 251(b)(5) of the 1996 Act *and* is not subject to regulation by the Commission in this proceeding.

It is now beyond dispute that ISP traffic is non-local, interstate traffic. This is controlling federal law. *Inter-Carrier Compensation for ISP-Bound Traffic*, FCC 99-38, Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 ("*ISP Order*"), ¶ 26 n.87. As ICG witness Starkey acknowledged at hearing (Tr. Vol. 1 at 83), the FCC ruled that when a carrier delivers Internet traffic to its ISP customers, the carrier is not terminating a call for purposes of section 251(b)(5) reciprocal compensation. Rather, Internet traffic continues past the ISP's local server to its ultimate destination or destinations, specifically at an Internet website that is often located at another state. *ISP Order* ¶ 12. Thus, ISP traffic is not local, but interstate. *Id.* ¶ 26 n.87.

The Panel Report states (at p. 10), "the Panel is not taking a position on the issue of whether ISP traffic should or should not be considered local traffic." This statement is puzzling. The FCC unequivocally held in the *ISP Order* that ISP traffic is *not* local. Moreover, the FCC reaffirmed that holding in a decision issued just weeks before the Panel issued its Report (and brought to the Panel's attention by Ameritech Ohio in a letter dated January 4, 2000), by ruling that "the service provided by the local exchange carrier to the ISP is ordinarily *exchange access service* because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its

ultimate destination in another exchange." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-413, Order on Remand in CC Dockets 98-147 *et al.*(rel. Dec. 23, 1999), ¶ 35 (emphasis added).

Thus, it is not for the Panel (or, with all respect, this Commission) to take a position on whether ISP traffic should or should not be considered local traffic. As a matter of controlling federal law, it is not local traffic, but interstate, exchange access traffic.

In its Post-Hearing Position Paper on Issue 3 (the "Issue 3 Paper"), Ameritech Ohio explained in detail why the fact that ISP traffic is interstate means that this Commission has no jurisdiction to address the question of inter-carrier compensation on such traffic in this proceeding. (*See* Issue 3 Paper at 2-9.) Ameritech Ohio incorporates that discussion by reference here. Ameritech Ohio's principal arguments, in summary form, were:

- In arbitrations under section 252(b) of the 1996 Act, State commissions are limited to imposing and applying duties under the 1996 Act. ISP traffic is not subject to the reciprocal compensation duties of the 1996 Act, as the FCC held in the *ISP Order*. Therefore, State commissions do not have jurisdiction to impose reciprocal compensation on ISP traffic in section 252(b) arbitrations. (Issue 3 Paper at 1-5.)

- Separate and apart from the limited scope of jurisdiction that the 1996 Act confers on State commissions as arbitrators under section 252(b), this Commission lacks authority to regulate ISP traffic in any event because ISP traffic is interstate. Ohio law empowers this Commission to regulate only communications that originate and terminate in Ohio, and the federal Communications Act of 1934 recognizes as well that the telecommunications authority of state regulatory commissions is limited to intrastate traffic. (Issue 3 Paper at 5-6.)[1]

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[1] ICG itself has recognized that "the states have no statutorily prescribed role in regulating interstate rates that fall outside Sections 251 and 252." Exhibit 2 to Ameritech Ohio's Response to Petition at 4-5.

II. THE COMMISSION SHOULD NOT RULE, AND CANNOT LAWFULLY RULE, THAT RECIPROCAL COMPENSATION MUST BE PAID ON ISP TRAFFIC.

A. The Panel Report Ignores Ameritech Ohio's Argument that if the Commission Entertains Issue 3, it Should Require the Parties to Abide by the FCC's Forthcoming Resolution of the Issue, Applied Retroactively to the Effective Date of the Agreement.

Even if the Commission had power to decide the ISP compensation issue, it would be unwise for the Commission to preempt the ongoing docket in which the FCC is addressing the same issue. Ameritech Ohio presented this argument to the Panel (Issue 3 Paper at 9-11), but the Panel Report does not address it.

As ICG itself has argued, individual State commission decisions on the ISP issue would "run the risk that there will not be uniform effective implementation of federal policy for this traffic." (Comments of ICG Communications, Inc., in CC Docket Nos. 96-98 and 99-68, Exhibit 2 to Response, at 3-5.) The best course would be for the Commission to require the parties to compensate each other for delivering ISP traffic (or not) in accordance with the outcome of FCC Docket 99-68 (*In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*), which will probably be released very early in the life of the agreement being arbitrated here.[2] It makes little sense for the Commission to delve into this highly-charged, complex issue only to have its decision supplanted shortly thereafter by the FCC's decision. *See* AO Ex. 7 (Harris Direct) at 13-14. ICG's own testimony, in fact, quotes FCC authority that "the public interest would be better served by addressing the matter [of inter-

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[2] No one knows for certain when the FCC will issue its order in the ISP docket. The new ICG/Ameritech Ohio agreement, however, will not go into effect until mid-February, 2000, and it seems highly unlikely that the FCC's order will not be out at least within a few months of then. *See* AO Ex. 7 (Harris Direct) at 13.

carrier compensation on ISP traffic] in the broader proceeding of general applicability." ICG Ex. 2 (Starkey Direct) at 48.

Accordingly, Ameritech Ohio suggests that if the Commission addresses Issue 3, it should require the parties to provide in their agreement that

- the parties will compensate each other (or not) for the delivery of Internet traffic to ISP customers in accordance with the FCC's decision in Docket 96-98; and
- if the FCC's decision issues after the Effective Date of the agreement, the parties will apply the decision retroactively to the Effective Date of the agreement, with a true-up to be effected within thirty days after the decision issues.

This is an eminently reasonable way for the Commission to ensure an outcome that is fair to the parties and in harmony with controlling federal law. (*See* Issue 3 Paper at 9-11.)

Alternatively, the Commission should require the parties' agreement to provide that the parties will compensate each other (or not) for the delivery of ISP traffic in accordance with whatever resolution of the matter this Commission reaches in the generic proceeding it just opened in Case No. 99-941-TP-ARB, retroactive to the Effective date of the agreement, with a true-up within thirty days after the Commission issues its decision.

beginning at the end user's premise and ending at ICG's switch" — but Ameritech did *not* contend that the ISP plays such a role. Rather, Ameritech argued that

> when an end user dials up the Internet, and thereby causes his local exchange carrier, his ISP and the carrier that serves the ISP to incur costs, the end user is acting as a customer of the ISP — just as he acts as a customer of an IXC when he makes a long distance call. . . . . (In both situations, of course, the end user is still also a customer of his local exchange carrier, but he places the long distance call in his capacity as a customer of the IXC and he dials up the Internet in his capacity as a customer of the ISP.) It is the ISP that marketed the service to the end user and determined the price, price structure and other terms and conditions under which the customer decided to dial up the Internet. The ISP will send the end user a bill, answer questions regarding the bill or the service, and collect the bill from the customer. (Issue 3 Paper at 23) (citations to testimony omitted).

Most important, though, the Panel Report concludes its discussion of this point by saying (at p. 9), "All of these factors suggest the ISP is an end user and not a carrier, and that the LEC-LEC model [rather than the LEC-IXC model] provides the proper construct for compensation for ISP calls." That conclusion, which is offered as the basis for the Panel's rejection of Ameritech Ohio's economic analysis, cannot survive the FCC's December 23, 1999, Order on Remand in *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-413, in CC Dockets 98-147 *et al.*

As noted above, the FCC held at ¶ 35 of that Order that "the service provided by the local exchange carrier to the ISP is ordinarily *exchange access service* because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange." Thus, *just like an interexchange carrier*, the ISP obtains exchange access service. And, *just like an interexchange carrier*, the ISP obtains that access service so it can "transport the communication by the end-user subscriber located in one state to its ultimate destination in another exchange." The *labeling* in the Panel Report

("the ISP is an end user and not a carrier) is irrelevant. What matters is that (i) the ISP performs the same *functions* with respect to an Internet call as the IXC performs with respect to an interexchange voice call; (ii) the person who makes an Internet call does so as a customer of the ISP in exactly the same way as the person who makes an interexchange voice call does so as a customer of the IXC; and (iii) therefore, the entities that combine to enable the end user to make the Internet call should compensate each other (or not) in the same way as entities that combine to enable the end user to make an interexchange voice call do — which means the originating LEC (Ameritech) should *not* compensate the other LEC (ICG) who joins it in providing access service to the entity in the position of the IXC (the ISP).

3. Contrary to the Panel's view, ISP traffic is not local by nature.

The Panel Report states (at p. 8), "Excepting for the fact that the FCC has ruled that ISP-bound calls are interstate, every other aspect of ISP calling suggests the calls are local." This proposition, which is key to the Panel's analysis of Issue 3, is dead wrong.

One indisputable difference between ISP traffic and local traffic — in addition to the fundamental difference that ISP traffic does not originate and terminate in the same local calling area — is that the holding times for ISP traffic are far greater. Whereas the average local call lasts approximately 3.5 minutes, the average Internet connection is on the order of eight or ten times longer. *See* AO Ex. 6 (Panfil Direct) at 13 and Exhibit EP-02 thereto.[5] ICG does not contest this fact, but instead offers the feeble rejoinder that Internet calls are not the only calls that last a long time. As ICG witness Starkey puts it (ICG Ex. 2 at 52), "If we were

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[5] The Ameritech study that is Exhibit EP-02 to the Panfil Testimony found that the average Internet connection lasts 26 minutes. There is also evidence suggesting that the average Internet session is 36 minutes. *Internet Basics*, Vol. 5, Issue 3, "Online Tidbits."